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**No. 217**

**IN THE**

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

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**THE STATE CORPORATION COMMISSION OF THE STATE OF KANSAS,**

*Appellant,*

**vs.**

**THE UNITED STATES OF AMERICA,**

*Appellee.*

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On Appeal From The United States District Court
For The District of Kansas.

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## BRIEF OF APPELLANT OPPOSING MOTION TO AFFIRM.

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### STATEMENT.

The Appellees, the Interstate Commerce Commission and the United States of America, have filed a motion to affirm; the rail appellees have filed separate motion. Both are based on the ground that it is manifest that the questions on which the decision of the cause depends are so insubstantial as not to need further argument.

It will simplify the issues to state at the outset that Appellant does not contend that the Commission was required to make a finding of reasonableness as to each specific rate. Neither does Appellant contend that the Commission failed to make any required finding or conclusion. Specifically Appellant does not contend that the Commission failed to find that a net revenue benefit to the rail lines would result from an increase in the involved rates. *Appellant does contend that the evidence was insufficient as a matter of law to support this finding.*

## ARGUMENT.

The basic question raised by this appeal is whether or not specific Kansas intrastate rates may be ordered increased upon evidence dealing soley with operating and revenue results on the entire traffic of the various railroads. No rail witness, with the single exception of a witness on bituminous coal, qualified as having any knowledge of the particular commodities involved in this proceeding. Based solely upon statistics as to the effect of former systemwide general increases on the entire body of freight rates, each rail witness was permitted to give his opinion that an increase in Kansas intrastate rates on these specific commodities would result in a net revenue benefit to the rail carriers. As stated by the Interstate Commerce Commission in its decision, referring to the testimony of these rail witnesses:

> "Their [rail witnesses'] statements that a net gain in revenue will result are supported by data showing that revenues generally have increased following the

application of authorized rate increases." (Jur. St. App. 51)

Data as to results of general increases applied to all traffic was the sole basis for the opinion each witness was permitted to give.

The increase cases such as *Ex Parte No.* 206[1] and *Ex Parte No.* 212[2] were general revenue cases involving the proposition that the entirety of the traffic was not producing sufficient general revenues, and that the whole level of rates should be horizontally raised to make up the deficiency. The proof in such a case was appropriate to the proposition that the general revenues were inadequate by a certain over-all amount and that a horizontal increase of a certain percent would not produce an excessive revenue. The present case arises from a rail petition to the Interstate Commerce Commission alleging that the Kansas intrastate rates on certain named commodities are so low as fail to earn their fair share of the necessary rail revenue and hence constitute a burden upon interstate commerce. The evidence must be appropriate to the proposition that raising the rates on these separate commodities will bring added net revenues to the carriers. No such evidence was adduced.

The District Court construed the 1958 amendment to Section 13(4) of the Interstate Commerce Act as permitting the Interstate Commerce Commission to order an increase in specific intrastate rates without consideration of evidence concerning the revenue producing characteristics of

1 299 ICC 429, 300 ICC 633.
2 302 ICC 665, 304 ICC 289.

the separate commodities. This appears conclusively from the following excerpts from the decision of the District Court:

> "It is clear to the Court, after examining this section and the entire record, that whether or not the rates imposed by the Kansas Corporation Commission have created an unreasonable or unjust discrimination against interstate commerce is determined primarily by criteria or factors pertaining to the over-all profitable operation of the railroad carriers involved in interstate commerce . . . . However, in the final analysis, it is system wide experience that warrants the greatest consideration because, in that way, the purposes of the Interstate Commerce Carrier Act can best be effectuated. Furthermore, the Interstate Commerce Commission must construe the act to 'promote safe, adequate, economical and efficient service and foster sound economic conditions in transportation . . .' In addition, since section 13(4) above set out provides specifically that the Interstate Commerce Commission may find without a separation of interstate and intrastate property, revenues, and expenses and without considering in totality the operations or results thereof of any carrier, or group of carriers, wholly within any state, further emphasis must be placed on the necessary profitable operation of the interstate carriers. *Under such circumstances, it seems unnecessary to discuss previous cases which considered the revenue from various commodities and products separately and which considered the effect that an intrastate rate increase might have upon the railroad's intrastate traffic in that commodity.*" (Jur. St., App. A, 5-6) (Emphasis supplied)

Based on evidence dealing only with the total revenue results on the entire consist of rail traffic throughout the rail system each rail witness testified that it was his

opinion that the rail lines would receive added revenue by increasing these particular rates. Each witness restricted the basis for his opinion to the data as to entire system traffic shown on his exhibit. An example will suffice to illustrate. Rail appellees use Witness William R. Wientage in their Motion to Confirm as an example of a witness supplying evidence that "the proposed rate increases might reasonably be expected to produce substantial additional revenues." (Rail Motion 8-9). The District Court did likewise. (Jur. St., App. 13)

Witness Wientage qualified as being a Commerce Assistant for the Frisco Railroad. (R. 181) He offered in evidence Exhibit No. 25. This exhibit showed by years, 1946 through 1959, the total tons of freight carried by the Frisco and the total gross freight revenue received. The witness had no knowledge, nor did he qualify as having any knowledge, concerning the particular commodities involved. Over objection that the witness had not qualified to answer the question, the witness, to the question "do you have an opinion as to whether the rate increases proposed in this case would result in increased freight revenue?", was permitted to testify as follows:

> "My opinion is that my Exhibit No. 25 indicates that the various ex parte increases have resulted in increased revenues for the Frisco, and that the application of the increases here sought will result in a further revenue increase." (R. 185)

This was the tenor of the testimony accepted by the Commission and on which it reached its conclusion that

the increases "will increase the revenues of the respondents by substantial amounts". (Jur. St., App. 54).

The State of Kansas contends that the evidence submitted by the rail lines does not support the finding that the increase of these specific rates will result in a net revenue benefit to the railroads. The 1958 amendment to Section 13(4) of the Interstate Commerce Act did not relieve the proponents of increased intrastate rates on specific commodities from the burden of showing that an increase in the rates on the specific commodities will result in added net revenues for the railroads. Evidence that general increases in all rates had in the past resulted in a net revenue benefit to the rail lines does not in itself establish that an increase in particular rates will have the same effect. Rail witnesses admitted that as to many commodities this had not been the effect in general increase cases.[3] In fact the principal rail witness declined to prognosticate as to whether or not increases in revenue would result from increasing the rates as to specific commodities here involved.[4] He confined himself to the opinion that applying the increases to all of the commodities here involved would in its sum total result in a net revenue benefit to the rail lines. He based this opinion, as did all the other rail witnesses, not upon any knowledge of the particular commodities, but upon the basis of the revenue results of past general increases applied to the entire consist of the system traffic. (R. 92-93). This is not adequate evidence upon which the Commission could make the finding that an in-

3 E.g. Witness Verchota, R. 179.
4 E.g. Witness Roberts, R. 105

crease in the rates on each of these commodities would, as to each such commodity, result in additional net revenues for the carriers.

Appellant does not contend that the District Court must weigh the evidence to determine what it would have decided in the first instance, had it had original jurisdiction of the subject matter. Appellant insists that under Section 10(e) of the Administrative Procedure Act, the trial court was required to review the whole record, including the Examiner's proposed report, to determine whether or not in view of the entirety of the evidence there was substantial evidence to support the findings of the Commission. The Court went no further than to determine that the evidence above referred to was sufficient as a matter of law to support the order of the Commission. This is confirmed by the statement of the District Court that,

> "... it seems unnecessary to discuss previous cases which considered the revenue from various commodities and products separately and which considered the effect that an intrastate rate increase might have upon the railroad's intrastate traffic in that commodity." (Jur. St., App. 6)

To say that it is unnecessary to consider the effect a rate increase might have on the railroad's intrastate traffic and revenues on the various products and commodities considered separately, as the District Court states, is simply to say that the Commission has the power to order the intrastate rates on a commodity raised even if it were accepted that to do so would result in loss of traffic and revenue. It seems unlikely that this can be the law. Cer-

tainly the propostion has not been approved by this Court up to the present time.

Appellant submits that there has been no change in the law to relieve the Commission or the Court from considering the effect that an intrastate rate increase might have upon the railroads' intrastate traffic and revenues on the particular commodities involved in the proceeding; that it was the duty of the District Court to review the whole record to determine as a matter of law whether or not there was sufficient evidence to support the finding that an increase in revenue will result from an increase in rates; that evidence of results of former general increases applied to the entire consist of the traffic of a railroad is insufficient as a matter of law to support a finding as to probable results of applying an increase to a particular commodity moving in intrastate traffic. The cases relied upon by appellees do not support a contrary doctrine.

*Louisiana Public Service Commission v. United States*, 125 F. Supp. 180, (affirmed per curiam 348 U. S. 885), involved principally the question as to whether or not the findings were sufficient. The District Court held that the findings and the evidence to support them both were sufficient. No recital of the evidence appears in the District Court opinion. Resort to the opinion of the Commission discloses that the evidence consisted in part of a traffic and revenue study of the particular commodities covering a six year period, and the experience of the railroads in applying intrastate increases to these separate commod-

ities over that six year period. The finding of the Commission was based specifically upon this evidence.

*Arkansas Public Service Commission v. United States*, 147 F. Supp. 454 (Aff. per curiam 355 U. S. 4) is similar to the *Louisiana case, supra*. Resort to the report of the Commission discloses that the rail lines put in evidence an eight year study of the separate commodities showing the results over the eight years of applying intrastate increases in Arkansas to these specific commodities. The Commission relied upon this study for its finding that an increase in rates would result in additional revenue.[6]

In *Cleveland Electric Illuminating Co. v. United States*, 147 F. Supp. 622, the District Court did not get to the question as to whether or not the evidence was sufficient to support the finding of discrimination against interstate commerce. The Interstate Commerce Commission had found, *inter alia*, that the intrastate rates created undue preference and prejudice as between intrastate and interstate shippers. The Court sustained this finding, then stated that having done so, "we are not required to pass upon the validity of its [the Commission's] conclusion in respect of revenue discrimination".

In *State of Alabama v. United States*, 141 F. Supp. 488, the rail lines put on elaborate evidence concerning the specific commodities by witnesses who qualified as having many years experience in the movement of these very commodities. The District Court abstracts much of this evidence in a footnote to its opinion.[7]

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5 **Louisiana Intrastate Freight Rates and Charges**, 291 ICC 279, l.c. 289-313 incl., and App. B pp. 317-318.

6 **Arkansas Intrastate Freight Rates and Charges**, 298 ICC 547, p. 559.

7 141 F. Supp. 488, footnote, 12 pp. 495-497.

The case principally relied on by Appellees and which appears to have misled the Commission and the District Court is *South Carolina v. United States*, 136 F. Supp. 897 (aff. per curiam 351 U.S. 944). The case does not support the proposition that probative evidence as to the probable effect of rate increases on the specific commodities is not required. In that case the traffic officials of the various Southern railroads made a study of the experience they had had in applying the same increases to the same commodities moving interstate. The District Court particularly notes that the finding of the Commission that added revenue would result from applying the increases intrastate was supported by this evidence of the result of applying them interstate on the separate commodities; that the opinion of the traffic witnesses was not given "ex cathedra".

There has been no case in any court where an order requiring a change in state rates has been sustained on such evidence as we have here. Always there has been evidence concerning the specific rates, and witnesses who qualified on *voir dire* as having knowledge of the specific rates and whose opinion thereon could be tested by cross-examination. The attempted cross-examination of Witness Kroll, whose testimony was relied on by the District Court,[8] and the rail appellees[9] demonstrates the *cul de sac* one runs into in an attempt to cross-examine a witness who has been permitted to testify without proper qualification. This is particularly true of rail witness Roberts, heavily relied

8 Jur. St., App. 10.
9 Rail Motion to Confirm 10-11.

upon by the Court as giving testimony to support the order.[10] Cross-examination of this principal rail traffic witness is a study in futility. Finally it came to the following:

> Q. On your exhibit 19 you give the trend of the Santa Fe's freight traffic tonnage and revenue for the years 1946 to 1959. That includes, does it, the total tonnage, carload, less carload and everything?
>
> A. Yes.
>
> Q. On all commodities?
>
> A. Yes, sir.
>
> Q. And it has no specific reference to any of the commodities in this proceeding?
>
> A. Not specifically, no.
>
> Q. Well, as it relates to this proceeding, what conclusion do you draw from this exhibit?
>
> A. I think I covered that in my testimony.[11]
>
> Exam. Fittipaldi: Sir, just answer the question, if you can.
>
> A. The conclusion is that while the tonnage has increased over 1946 and the revenue also has increased over 1946, the revenue increase has been greater percentagewise than the tonnage increase.
>
> Q. On all commodities?
>
> A. All commodities, that is what it covers.
>
> Q. You don't relate it to any specific commodities?
>
> A. No, sir. (R. 79-80)
>
> • • • • •
>
> Q. . . . I would like to ask you just what study you made as a basis for that conclusion, if any? [The

10 Jur. St., App. 12.

11 On direct the witness had testified, "It is my considered opinion that generally such diversions under the proposed increases also will be small." (R. 54)

conclusion that the increases would cause only small diversion of the specific commodities.]

A. We made no specific study.

Q. At all?

A. No, sir. (R. 92)

Appellees point out that the Commission denied increases on bituminous coal and on refractories and related articles and reason that this lends assurance of the lawfulness of the order.[12] As to the latter, there had been no rail movement in the past, hence the Commission was forced to find, as it did find, that there was "no basis for the essential finding that the increases would produce a net revenue gain."[13]

As for bituminous coal, it was the only commodity on which the rail appellees produced a witness who qualified on *voir dire* to testify concerning a specific commodity.[14] It is significant that on the one commodity on which a witness was produced who was qualified to answer questions on cross-examination, the Commission denied the increases. Actually the Commission found that coal production in Kansas had declined 70.7 percent between 1946 and 1959, whereas nationally the decline had been only 23.2 percent, and that in the prior Kansas proceeding it had refused to increase the Kansas coal rates because the decline in coal production in Kansas convinced it that rate increases could not produce added revenue.[15]

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12 Rail Motion to Affirm, 14; Government Motion to Affirm, 4.
13 Jur. St., App. 42.
14 Witness William A. Streck, R. 127 et seq.
15 Jur. St., App. 44-45.

The fact that after this proceeding was instituted the carriers voluntarily reduced the rates on cement and brick and related articles,[16] is significant. After the decision of the Commission the carriers voluntarily reduced rates on other items, which was the occasion for the second petition for rehearing mentioned at page 4 of the rail Motion to Affirm. As recently as June 17, 1963, these same rail carriers filed petition with the Interstate Commerce Commission for modification of its order to permit a reduction in certain Kansas intrastate rates on cinders, clay, shale, etc., which rates were required to be increased by the order here under consideration. And on July 3, 1963 the rail carriers filed a petition to correct certain intrastate rates on various petroleum products because the intrastate rates published pursuant to the order are higher than the level now being maintained interstate on the same items.[17] All of this strongly indicates that the order of the Commission is a mere sub-delegation to the rail carriers of the control over the Kansas intrastate rates which the Commission has erroneously taken from the appropriate Kansas agency.

This Court has time and again asserted that before federal power may be exercised in the area reserved for state jurisdiction the evidence to justify such execution of federal power "must meet a high standard of certainty". *State of Florida v. United States,* (1931) 282 U. S. 194; *Illinois Central R. Co. v. Pub. Utilities Commission,* (1918) 245 U.S. 493; *Public Service Commission of Utah v. United*

16 Jur. St., 25, 26.
17 Petitions filed in ICC Docket No. 33239.

*States* (1958), 356 U. S. 421. If the proof offered here is to be held sufficient, then state control of its own commerce has indeed disappeared.

It is submitted that the evidence supporting the order of the Commission was insufficient as a matter of law, and that the District Court erred in holding that it is unnecessary to consider "the revenue from various commodities and products separately" or to consider "the effect that an intrastate rate increase might have upon the railroad's intrastate traffic in that commodity."

The Motion to Confirm should be overruled.

Respectfully submitted,

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